In The

Supreme Court of the United States

October Term, 1975

No. 75-1827

LEON GREENBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, LEON GREENBERG, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 19, 1976.

Opinion Below

The opinion of the Court of Appeals dated April 19, 1976, is unreported, but is printed in Appendix A, *infra*, at p. A-1, *et seq.*

Jurisdiction

Following a jury trial, petitioner was found guilty in the United States District Court for the Southern District of New York of conspiracy and mail fraud in violation of §§ 371 and 1341 of Title 18 of the United States Code. On January 21, 1976 petitioner was fined $9,000 and placed on probation for two years.

On April 19, 1976, the Court of Appeals for the Second Circuit affirmed petitioner's conviction.

This petition for a writ of certiorari is filed within sixty days following that affirmance, an extension of time having been granted by Mr. Justice Marshall in an Order dated April 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

nor shall private property be taken for public use, without just compensation.

Statutes Involved

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter

or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Questions Presented

1. Whether the trial court's grievous error in charging the jury that a reasonable doubt was equivalent to a "substantial" doubt, in direct defiance of *Winship*, denied petitioner due process of law.

2. Whether a federal grand jury has authority to designate persons as "unindicted co-conspirators".

3. Whether petitioner was denied due process of law by the trial court's refusal to hold a hearing on his complaint that illegally seized evidence was used in a federal prosecution.

STATEMENT OF FACTS

The petitioner, Leon Greenberg, a lawyer and president of the Monticello Raceway in Sullivan County, New York, was charged in a five-count indictment with the crimes of conspiracy and mail fraud. The alleged crimes centered around the bar mitzvah held for petitioner's son on November 7, 1970 at the Grossinger Hotel. Paul Grossinger, a long-time friend and a vice president of the Raceway, prevailed upon petitioner to hold his son's bar mitzvah at the Grossinger resort. Petitioner contended that Grossinger promised to donate the food, and he agreed to pay all other expenses, which included the cost of flowers, orchestra, magician, photographer, gratuities, and all other incidental expenses.

As of November 8, 1970, the day after the bar mitzvah, Gossinger's records showed the outstanding retail price of the bar mitzvah as $3,171.* In the spring of 1971 the petitioner

*The retail charges of $3,171 included a gratuities charge of $1,200 which petitioner proved he paid on the day of the bar mitzvah. That would reduce the bill to $1,971. All the figures are rounded off to the nearest dollar.

received his first bar mitzvah bill from Grossinger's in the amount of $5,843. The statement was not itemized and did not correspond with the Grossinger ledger card containing charges of $3,171.

Since the bar mitzvah bill did not correspond with his understanding of the financial arrangements, on April 6, 1971 petitioner wrote a letter to Grossinger's which simply stated, "Will you please verify the correctness of this bill?"

The Horsemen's Outings

Over the years the Raceway encouraged its drivers to race at its track by entertaining them rather lavishly. Every Wednesday during the summer of 1970 the horsemen — trainers, drivers, grooms and other racetrack personnel — were invited to Grossinger's or another resort hotel in Sullivan County for cocktails, lunch, golf and dinner.

Peter Donnolly, the golf pro at Grossinger's in 1970, testified that there were about six horsemen's outings held at Grossinger's on Wednesdays throughout the summer of 1970. He recalls that 20 to 40 horsemen from the Raceway attended each outing. Other witnesses testified to the occurrence of the outings, including various horsemen, the Raceway's comptroller and Grossinger's assistant maitre d'. The only witness who testified that the outings could not have occurred was Paula Bergman, a former employee of Grossinger's who admitted on cross examination that her testimony was based on the absence of records and not on her personal knowledge. She worked in the golf clubhouse during 1970 and contended that a separate score would be made up for each golfer, whether he was a horseman or a guest. However, petitioner offered proof that special events such as the horsemen's outings were not normally recorded on golf slips.

When petitioner realized that the Raceway had never been billed for the horsemen's outings held during July and August of

1970, he contacted Grossinger who in turn told his comptroller, Bernard Roth, to call petitioner for the details of the outings for billing purposes. After Roth had computed the five bills, he contacted petitioner and told him that the total was approximately $3,000. Because petitioner understood the affairs to have consisted of lunch, cocktails, golf and dinner for at least 168 horsemen, he believed that the Raceway owed Grossinger's approximately $5,000. Grossinger's eventually billed the Raceway $4,856 for the outings.

The Raceway's check in payment of the horsemen's bills was drawn on October 29, 1970 but held for Executive Committee approval. It was signed at the Executive Committee meeting by Sidney Sussman, the chairman of the board of Monticello Raceway, and petitioner. When the check, in the amount of $4,856.16, was received by Grossinger's, it was posted under the account of Sullivan County Harness Racing Association.

The Bar Mitzvah Bill

Paul Grossinger, without ever talking to petitioner, instructed Bernard Roth to reduce the bar mitzvah bill by the amount of the check received by Grossinger's for the horsemen's outings. At the trial Grossinger freely admitted that his action was based upon a conclusion he reached himself. A misunderstanding apparently arose when, in the summer of 1970, petitioner had indicated to Grossinger that he had executive committee approval for the billing of the horsemen's outings. Petitioner paid the balance of $987 by his personal check.

The Investigation

In January, 1974 the New York State Organized Crime Task Force (Task Force) acting under authority of New York Executive Law §70-a, launched an investigation into the running of superfecta races at Monticello Raceway. No indictments were returned accusing anyone of misconduct concerning the handling of superfecta races. When this phase of the investigation was closed, the Task Force turned on petitioner and began looking into his personal affairs. The bar mitzvah records were examined and Paul Grossinger contacted. Paul Grossinger resigned as a director of the Raceway and returned the Raceway's $4,856 check. He then went to the Task Force and testified under an alleged grant of immunity. All information was turned over to the United States Attorney's office.

A five-count indictment was returned against the petitioner, charging him with conspiracy under §371 of Title 18 and mail fraud under §1341. Paul Grossinger and Bernard Roth were named in the indictment as unindicted co-conspirators.

The petitioner was convicted on November 5, 1975 and was fined $9,000 and placed on probation for two years. The United States Court of Appeals for the Second Circuit affirmed his conviction on April 19, 1976.

REASONS FOR GRANTING THE WRIT

I.

The trial court's grievous error in charging the jury that a reasonable doubt was equivalent to a "substantial" doubt, in direct defiance of *Winship*, denied petitioner due process of law.

The question which dominates this petition involves the trial court's misinstruction on the important doctrine of reasonable doubt. In direct defiance of this Court's recent pronouncement in *In re Winship*, 397 U.S. 358 (1970) the court misadvised the jury:

> "A reasonable doubt is one that arises out of the evidence in the case or the lack of evidence. It is a doubt which is substantial and not merely shadowy" (A-635).*

Counsel specifically objected to this charge. The jurors, after deliberating for over a day, asked to hear, once again the judge's "interpretation" of a reasonable doubt. The court repeated the above instruction. Certainly, this provocative event did the most to ruin petitioner's case. This version of the reasonable doubt instruction is constitutionally intolerable and demands immediate corrective action. This wayward instruction is in direct conflict with the decisions of other circuits which have specifically rejected the "substantial doubt" precepts. *United States* v. *Bridges*, 499 F.2d 179 (7th Cir. 1974); *United States* v. *Atkins*, 487 F.2d 257 (8th Cir. 1973); *United States* v. *Alvero*, 470 F.2d 981 (5th Cir. 1973); *United States* v. *Christy*, 444 F.2d 448 (6th Cir. 1971).* Consequently there is a dramatic position in the circuit courts that must be resolved if the reasonable doubt doctrine is to remain viable and meaningful.

*Refers to pages of appendix filed in United States Court of Appeals for the Second Circuit.

In 1970 this Court reaffirmed its devotion to the constitutional proposition that a criminal charge must be proven beyond a reasonable doubt. *In re Winship, supra.* There the Court, in majestic language, proclaimed:

> "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence. . . . [I]t 'impresses on the trier of fact the necessity of reaching a subjective *state of certitude* of the facts in issue.'
>
> * * *
>
> "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty" (397 U.S. at 363-64; emphasis supplied.)

The *Winship* proclamation has substantially undermined those authorities that have approved the "substantial doubt" instruction which has already spread throughout the instructions given in the Second Circuit. Such a charge drastically

* In *Christy*, the court declined to reverse because of the district court's overall charge on reasonable doubt, but declared, "Were this the District Court's only reference to or explanation of the concept of reasonable doubt, the unfortunate inclusion of the questioned word would present an issue of some magnitude" (444 F.2d at 450). *See also United States* v. *Gratton*, 525 F.2d 1161 (7th Cir. 1975), where the court approved the charge "A 'reasonable doubt' means a doubt based on reason and it must be substantial rather than speculative. . . ." Since no objection was registered to this instruction, the court declined to reverse the conviction.

depreciates the constitutional safeguard of "proof beyond a reasonable doubt".

Nowhere in any of this Court's pronouncements on reasonable doubt is there the slightest suggestion that a juror must have a "substantial doubt" to entitle a defendant to an acquittal.* Such an instruction overstates the degree of uncertainty required for a reasonable doubt. A juror might well have a doubt that is reasonable, under all the circumstances of a case, but in his mind it may not be "substantial." The layman's understanding of the term "substantial" is that of being great, significant, or large. These terms are not compatible with "reasonable."**

The "reasonable doubt" injunction mandates that the prosecution must overcome all of the jury's reasonable doubts — not "substantial doubts" — before a citizen can be condemned forever to a criminal conviction. The practical effect of the "substantial doubt" direction is the unauthorized power it gives a convicting juror to shout down uncertain jurors by declaring "the judge says your doubt has to be substantial!" Certainly

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*In *Holland* v. *United States*, 348 U.S. 121 (1954), this Court was met with the argument that the trial judge improperly charged as to reasonable doubt when he defined it as "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon" (348 U.S. at 140). However, *Holland* is distinguishable because the Court was not called upon, as it is here, to rule upon the inequivalency of a "substantial doubt" and a "reasonable doubt".

**In *Missouri* v. *Davis*, 482 S.W.2d 486, 490 (Mo. 1972) Justice Seiler of the Missouri Supreme Court, in a concurring opinion, observed:

> "'Reasonable' and 'substantial' are not synonymous, as can be seen by referring to any of the standard dictionaries. The point was well put by counsel in argument recently where he pointed out that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being told there was a substantial chance of success."

such a charge puts jurors who are unconvinced at a decided disadvantage. Requiring a dissenting juror to overcome a "substantial" doubt cannot be reconciled with all that has been said by this Court on the doctrine of reasonable doubt. Intrusion of the term "substantial" into this rule wreaks havoc with the principle on which our notion of proof beyond a reasonable doubt rests.

Today more than ever we must acknowledge that any person facing the awesome force of a federal prosecution is in great jeopardy even when innocent. Thus, the constitutional emblem of proof beyond a reasonable doubt is desperately needed to protect defendants exposed to the inclemencies of a law-and-order mood which is reaching epidemic proportions in this nation. That great barricade must be refortified to protect defendants against jurors who are forced to live in a world filled with wailing sirens, drop locks and meaningless violence.

The only antidote a defendant has against these fears, which prowl the jury deliberation room in large cities, threatening the security of dispassionate verdicts, is the reasonable doubt parole. A continued policy of appeasement will bring about the downfall of this great rule.

In this close case, petitioner's fate trembled in the balance for two days while the jury deliberated. Then, at a critical moment in the life of this trial, the jurors asked for an explanation of reasonable doubt and were met with the "substantial doubt" mandate. At that moment the petitioner's conviction was ordained and this case was destined to reach this Court.

Under the centrifugal force of *Winship* and the authorities contained in this brief, the highly unpredictable word "substantial" should be forever cleansed from the reasonable doubt edict. This case, more than any other, has imperiled that great doctrine designed to protect all men from unjust convictions. Thus petitioner's writ of certiorari should be granted.

II.

The federal grand jury's designation of the petitioner's alleged accomplices as unindicted co-conspirators denied him due process of law.

This case raises a question of constitutional proportions involving the authority of a federal grand jury to designate persons as "unindicted co-conspirators." When the grand jury accused Leon Greenberg of a criminal offense it fulfilled its investigative purpose. Beyond that, the grand jury had no authority to designate other persons as co-conspirators. Its powers are not defined in the Constitution or by Congress, but rather are delineated by the federal courts. These well-defined functions do not include predatory, public accusations directed at persons not named as defendants. Nevertheless, the grand jury labeled both of the petitioner's alleged accomplices as "unindicted co-conspirators." The trial judge, in instructing the jury, on 19 separate occasions read this designation to the jury. Obviously this was highly prejudicial because both of the alleged accomplices (Bernard Roth and Paul Grossinger) testified at the petitioner's trial and denied any wrongdoing charged in the indictment.

There is absolutely no authority allowing a federal grand jury to issue a report accusing persons not indicted of criminal conduct. There is no power for a grand jury to achieve by indictment what it cannot do by issuing a public report. In *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975), the Fifth Circuit, in an unimpeachable decision, declared:

> "We have found no reported opinion or scholarly commentary, and the government suggests none, contending that a federal grand jury is empowered to accuse a named private person of crime by means of an indictment which does not make him a defendant" (514 F.2d at 801).

The *Briggs* opinion combines dramatic narrative with a scholarly treatise on the powers of grand juries. The bright glare from this fearless opinion has lit up the whole legal firmament of grand jury proceedings. The Fifth Circuit, without flinching, finally concluded:

> "The grand jury has been variously viewed as an arm of the court, as an instrumentality of the people, and as an adjunct of the judiciary but with the power to act, within certain bounds, independently of the traditional branches of government. We conclude, without the necessity of adopting a particular characterization, that a federal court has the power to expunge unauthorized grand jury action" (514 F.2d at 806-07).

Although in the *Briggs* case the "unindicted co-conspirators" moved to have their names expunged from the indictment, the principle applies with equal force here. The harm occasioned by the court in repeatedly describing Grossinger and Roth as "unindicted co-conspirators", seared into the minds of the jurors their unproven complicity which eventually wrongly inculpated Leon Greenberg.

The defense urged throughout the trial that no one had committed any criminal acts and that the outings had actually taken place. Thus, it was absolutely devastating to have the Government's two leading witnesses, who gave testimony favorable to the defense, impugned as "unindicted co-conspirators." The jury was left with the distinct impression that since Grossinger and Roth were conspirators and accomplices, the petitioner must have been implicated also. For that matter, this repeated denouncing of the witnesses as "unindicted co-conspirators" must have detonated the jury's worst prejudices and caused them to come back and ask the understandable question why these two men were not prosecuted if they were in fact co-conspirators and accomplices.

The *Briggs* decision sounds a clarion of rationality during a time when grand juries throughout the country have ravaged

thousands of witnesses, assailing them as "unindicted co-conspirators" and leaving them homeless and searching for a rule to rescue them from this calamity. This craven practice has gone on without any legal consensus for too long.

The Court must not be lured away from this significant issue by any claim that grand juries have been engaging in this practice for a long time. We are proud to acknowledge that recently our courts have bravely ventured down the mean streets of grand jury malpractices and have been appalled by what was seen. A new testament is now being written bringing to a stop these subversive grand jury practices.* The *Briggs* case is compatible with this philosophy and advances its objectives.

In a case as close as this, there was no excuse for drenching the jury with the constant designation of two helpful witnesses as

*The Second Circuit has halted the misleading use of hearsay before grand juries in *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972); it has also foreclosed a grand jury from acting beyond the end of its 18-month statutory life, *United States* v. *Fein*, 504 F.2d 1170 (2d Cir. 1974); *McClure* v. *County Court of the County of Dutchess*, 41 A.D.2d 148, 341 N.Y.S.2d 855 (2d Dept. 1973). Other courts have required the legal instructions given to grand juries to be recorded, *People* v. *Percy*, 45 A.D.2d 284, 358 N.Y.S.2d 434 (2d Dept. 1974), *aff'd*, N.Y.2d , N.Y.S.2d (Jan. , 1976). New York courts have now insisted that legal instructions furnished grand juries must be accurate, *People* v. *Mackey*, 371 N.Y.S.2d 559 (Suffolk County Ct. 1975); *People* v. *Ferrara*, 370 N.Y.S.2d 356 (Nassau County Ct. 1975); *People* v. *Lawson*, 374 N.Y.S.2d 270 (Sup. Ct. 1975). The California Supreme Court has held that a prosecutor has a duty to inform a grand jury about exculpatory evidence, *Johnson* v. *Superior Court*, 18 Crim. L. Rptr. 2054 (Sept. 19, 1975). The abuse of grand jury process is being stopped, *United States* v. *Dardi*, 330 F.2d 316 (2d Cir. 1964); *United States* v. *Fisher*, 455 F.2d 1101 (2d Cir. 1972); *In re grand jury subpoena of Stolar*, 397 F.Supp. 520 (S.D.N.Y. 1975). The practice of knowingly presenting perjured testimony before a grand jury is being halted, *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974); *see also* Frankel and Naftalis, *Grand Jury — An Institution on Trial*, THE NEW LEADER, November 10, 1975, Vol. LVIII, No. 22; The New York State Investigation Commission conducted hearings in New York City and Buffalo, New York, in January of 1976 concerning grand jury leaks.

"unindicted co-conspirators." The jury was left with the impression that since the other two persons must have committed the crime, the petitioner did also. The petitioner's presumption of innocence was severely lacerated by these unfortunate and relentless remarks.

The establishment of fair trials is one of the most cherished policies of our civilization. Surely good common sense and logic require that this regrettable practice be discontinued. There is absolutely no authority for it, and it does not warrant approval.* For all these reasons, the petition for a writ of certiorari should be granted.

III.

Petitioner was denied due process of law by the trial court's refusal to hold a hearing on his complaint that illegally seized evidence was used in a federal prosecution.

Lurking immediately beneath the surface of this case is a question of constitutional proportion sadly neglected by both the trial court and the Second Circuit. Evidence illegally acquired by the state permeated the federal prosecution and fatally tainted it. To fully understand the petitioner's complaint that the evidence, insufficient though it is, in support of his conviction was the fruit of the illegal activities of the New York

*If this Court were to decide that it is still appropriate to designate a person in an indictment as an "unindicted co-conspirator," certainly it should hold that it is inappropriate to read that language to the jury. As for the instruction on the accomplice rule, this should never be given automatically. This advice is similar to that of the defendant taking the witness stand. The views of lawyers differ as to the advantage or disadvantage of that instruction. Consequently, most federal judges will seek permission to give the instruction or otherwise withhold it. The same rule should apply to the accomplice instruction. It is this lawyer's view that a defendant in the federal courts profits very little from the accomplice instruction since there is no requirement of corroboration. What is much more devastating is to have the jury told that witnesses are accomplices, implying the defendant's guilt.

State Organized Crime Task Force ("Task Force") requires a brief statement of the facts relative to the earlier investigation.

In January of 1974 the Task Force launched an investigation into alleged irregularities in the running of superfecta races at the Monticello Raceway as well as other racetracks in New York State. The 18-month investigation ended without anyone being charged with any misconduct.* However, the Task Force, undaunted by this failure, veered off in a different direction and began rummaging through the personal affairs of petitioner. In its efforts to obtain information about him, the Task Force served subpoenas upon various members of the Raceway's Board of Directors on June 24, 1974. Applications were immediately made to quash the subpoenas because the records sought were irrelevant to any investigation which the Task Force was authorized to conduct. Justice Harold Hughes, of the Supreme Court of Albany County, quashed the subpoenas on the grounds that the Task Force's inquiry was unauthorized in that its investigation did not involve organized criminal activity that crossed county or state lines.**

However, while Justice Hughes' decision was being appealed by the Task Force, the records seized from the Raceway were impounded by the state authorities. This evidence was turned over to the United States Attorney for the Southern District of New York and submitted to the grand jury which indicted Leon Greenberg. The use of this poisoned evidence by the Govern-

*The Raceway has never been charged with any misconduct by the New York State Harness Racing Commission, the Federal and State Securities and Exchange Commissions, the State Liquor Authority, the Department of Labor, the State Department of Taxation, or the United States Internal Revenue Service, all of whom have jurisdiction over the Raceway.

**The Appellate Division, Third Department, unanimously upheld Justice Hughes' well-considered decision. *Sussman* v. *New York State Organized Crime Task Force*, 48 A.D.2d 154, 368 N.Y.S.2d 558 (3d Dept. 1975), *aff'd*, N.Y.2d , N.Y.S.2d (April 1, 1976).

ment was challenged in the petitioner's omnibus motion filed in advance of his trial. The court denied a hearing on this issue and did not discuss in any way the rejection of this complaint.

Leon Greenberg's motion to suppress the evidence turned over to the federal grand jury should have been granted on the grounds of the "fruit of the poisonous tree" theory.

In the landmark decision of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), the Government had seized "without a shadow of authority" the defendant's books, papers and documents. Pursuant to a court order, the defendant secured the return of its items; however, the Government had photographed the documents while they were in its possession and used the photographs to obtain a subpoena requiring the defendant to produce the originals at trial. The court reversed the judgment stating:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all" (251 U.S. at 392).*

In the instant case, petitioner would have been able to show that the bulk of the evidence submitted to the federal grand jury was gathered unlawfully by the state investigatory agency. Even the testimony of Paul Grossinger was illegally acquired through this unauthorized investigation and should have been unavailable to the federal government as well as that of Bernard Roth.

*_Silverthorne_ was followed by *Nardone* v. *United States*, 308 U.S. 338 (1939), where the Court refused to permit the prosecution to avoid an inquiry into its use of information gained by illegal wiretapping noting that:

> "Here, as in the *Silverthorne* case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but *the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively*" (308 U.S. at 341; emphasis supplied). *See also Wong Sun* v. *United States*, 371 U.S. 471 (1963).

In *Elkins* v. *United States*, 364 U.S. 206 (1960), this Court defined the question as follows: "May articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, be introduced . . . in a federal criminal trial?" (364 U.S. at 208).*

There can be no doubt that the *Elkins* prohibition of the use of evidence procured by unlawful search and seizure conducted by state officials applies equally to evidence obtained through the use of illegal state subpoenas.

Recently, in *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1972), the Second Circuit, in a similar case, suppressed evidence unlawfully acquired by the Government from state officers and dismissed the indictment. In *Birrell* papers and records were

*In holding that evidence obtained by state officers during a search which, if conducted by federal officers would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over the defendant's timely objection in a federal criminal trial, the Court noted:

> "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's efforts to assure obedience to the Federal Constitution.
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> * * *
>
> "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered" (364 U.S. at 221-22).

seized from an apartment occupied by the defendant's girl friend in pursuit of a murder investigation. Since the federal government was interested in Birrell, a legendary figure in that Circuit, it dispatched a federal agent to examine the records held by the police. The special agent found several documents which ultimately led to Birrell's indictment for perjury. Since the Government did not acquire a proper warrant to obtain this information, the court concluded that the evidence must be suppressed and the indictment had to be dismissed.

Our situation is no different. We would have been able to show that the Government's whole case in this prosecution was originally assembled by the state Task Force in a proceeding later determined to be unlawful because that agency was acting outside its jurisdiction.* *United States* v. *Hunt*, 496 F.2d 888 (5th Cir. 1974).

Here the Government plunged into these protected precincts without regard for the consequences. They must now bear the responsibility for that misadventure. For if these gross violations of the fourth amendment are ignored, the deterrent effect of our constitutional rules governing unlawful searches by both the state and the federal government will be significantly undermined. To lessen the threat to every man's security and privacy from low visibility searches, this petition for certiorari must be granted.

*In *United States* v. *McSurely*, 473 F.2d 1178 (D.C. Cir. 1972), the Court of Appeals held that where subcommittee subpoenas (which formed the basis of a contempt charge) were based on an investigator's illegal seizure of defendant's property obtained by state officials through an unconstitutional search, the evidence should have been suppressed. The *McSurely* case resembles our own and should compel this Court to reach the same conclusion.

CONCLUSION

For all these reasons, the writ of certiorari should be granted.

June, 1976

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 903—September Term, 1975.

(Aruged April 6, 1976 Decided April 19, 1976.)

Docket No. 76-1054

UNITED STATES OF AMERICA,

Appellee,

v.

LEON GREENBERG,

Appellant.

Before:

ANDERSON, MULLIGAN and MESKILL,
Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court, Southern District of New York, Pollack, *Judge*, and jury, finding appellant guilty of one count of conspiracy to commit mail fraud in violation of 18 U.S.C. §371, and four substantive counts of mail fraud in violation of 18 U.S.C. §1341.

Affirmed.

Herald Price Fahringer, Esq., Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, New York, on the brief), *for Appellant.*

T. Barry Kingham, Assistant U. S. Attorney, Southern District of New York (Robert B. Fiske, Jr., U. S. Attorney, and Lawrence B. Pedowitz, Assistant U. S. Attorney, Southern District of New York, on the brief), *for Appellee.*

PER CURIAM:

Leon Greenberg was convicted of one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. §371, and four substantive counts of mail fraud, in violation of §1341.

The indictment alleged that Greenberg, then the President of Monticello Raceway in Sullivan County, New York (hereinafter referred to as Raceway), conspired with Paul Grossinger, owner of The Grossinger Hotel and a director of Raceway, and Bernard Roth, comptroller of the hotel, to defraud Raceway through the device of billing it for services not actually rendered to it, the payments for which were used to defray the greater part of the cost of a bar mitzvah, held at the hotel, for Greenberg's son. There was evidence from which the jury could find that Grossinger, with the complicity of Greenberg, composed fictitious bills for outings purportedly held for Raceway personnel at the hotel on five Wednesdays in July and August, 1970. These fake bills were sent through the mail to Raceway, and payment was made through the mail in October, 1970, in the normal course of business.

After the bar mitzvah was held in November, 1970, the hotel sent Greenberg a bill for $5843.25, which he returned with a note, "please verify the correctness of this bill." Grossinger and Roth then reduced Greenberg's bill by the exact amount which Raceway had paid for the purported outings ($4856.16), so that Greenberg ultimately paid only $987.09. This was sufficient to violate Title 18 U.S.C. §1341. *United States* v. *Maze*, 414 U.S.

395, 400 (1974). *See also United States* v. *Marando*, 504 F.2d 126 (2d Cir.), *cert. denied sub nom. Berardelli* v. *United States*, 419 U.S. 1000 (1974); *United States* v. *Cohen*, 518 F.2d 727 (2d Cir.), *cert. denied sub nom. Duboff* v. *United States*, 423 U.S. 926 (1975).

Appellant Greenberg offered evidence to contradict the Government's proof but the jury resolved the questions of fact against him. Viewing the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), and considering the right of the jury to determine issues of credibility, weigh the evidence, and draw reasonable inferences of fact, *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974), we are satisfied that there was sufficient evidence to support the jury's verdicts of guilty. In particular, appellant claims that there was insufficient evidence of a conspiratorial agreement among himself, Grossinger, and Roth to *defraud* Raceway. There was sufficient evidence for the jury to conclude, however, that the alleged conspirators knew their scheme was a fraud, which was designed to redound to Greenberg's pecuniary benefit, at the expense of Raceway corporation and its stockholders.

The remaining claims made by Greenberg on his appeal do not call for discussion.

The judgments of convictions are affirmed.